[K-80]

Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself And All Other Taxpayers Similarly Situated,

Petitioners,

against

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENT NEW YORK STATE TAX COMMISSION IN OPPOSITION TO GRANTING CERTIORARI

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Syracuse, New York

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Respondents.

BRIEF FOR RESPONDENT NEW YORK STATE TAX COMMISSION IN OPPOSITION TO GRANTING CERTIORARI

Preliminary Statement

The respondent New York State Tax Commission submits this brief in opposition to the petitioners' application to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which unanimously affirmed without opinion the order and judgment of the Supreme Court, New York County. The Supreme Court order and judgment *inter alia* declared (1) that admission charges to circuses presented in New York State are subject to sales taxes under New York Tax Law, Article 28 and to Title A of Article 46 of the Administrative Code of the City of New York when presented in New York City; (2) that circuses are not exempt from the taxes as "dramatic or musical arts performances" or as "a live, dramatic, choreographic or musical performance" within

the meaning of the New York State Tax Law, §§ 1105(f) (1) and 1101(d) (5) and the New York City Administrative Code, §§ A 46-2.0(f) (1) and A 46-1.0(d) (5); (3) that the taxes on their face and as applied to the petitioners do not violate nor infringe on the petitioners' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, Section 1, the Due Process Clause of the Constitution nor the First Amendment to the Constitution; (4) denied the petitioners' motion for leave to replead by alleging that the respondents have discriminated against interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution; and (5) on rehearing adhered to a decision denying a motion for discovery of documents sought to show selective enforcement of the Sales Tax laws on the grounds that the petitioners have failed to demonstrate the existence of the triable issue as to any intentional and invidious plan of discrimination on the part of the respondents and at most all that the petitioners have shown is mere nonenforcement of the statute against others similarly situated.

On February 20, 1980 the New York Court of Appeals denied the petitioners' motion for leave to appeal to that Court (49 NY2d 703) and dismissed their appeal on the ground that no substantial constitutional question is directly involved (49 NY2d 800). The petition to this Court for a writ of certiorari was received by the New York Attorney General on May 27, 1980.

On November 20, 1979 the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, had unanimously affirmed without opinion the order and judgment of the Supreme Court of the State of New York (New York County) entered on June 9, 1978 (72 AD2d 978).

Constitutional Provisions

The relevant provisions of the United States Constitution are: Amendment Fourteen, Section 1, the Due Process and Equal Protection Clauses; Amendment One, the Freedom of Speech Clause; and Article I, Section 8, clause 3, the Commerce Clause.

State Statutes

A. New York State Tax Law, Article 28, entitled "Sales and Compensating Use Taxes" (enacted by Laws of 1965, ch 93, effective August 1, 1965):

1. New York State Tax Law, § 1105, entitled "Imposition of sales tax", subd (f) (1):

> "* * * *there is hereby imposed* and there shall be paid *a tax of four percent upon*:[*]
>
> * * *

"(f) (1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the state, except charges for admission to* race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools * * *." (Emphasis added.)

2. New York State Tax Law, § 1101, entitled "Definitions", subd (d) (5):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a*

*The originally enacted rate was two percent. The rate was increased to three percent effective April 1, 1969 and was again increased to four percent effective June 1, 1971.

live dramatic, choreographic or musical performance." (Emphasis added.)

3. New York State Tax Law, § 1116, entitled "Exempt organizations", subd (d) (2) (B):

"(2) The exemption provided in paragraph (1) of this subdivision [exempting admission charges to amusements for the benefits of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:

* * *

(B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation."

4. New York Tax Law, § 1146 entitled "Returns to be secret" subd (a):

"§ 1146. Returns to be secret

"(a) Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a return or report filed with the tax commission pursuant to this article, to divulge or make known in any manner any particulars set forth or disclosed in any such return or report. The officers charged with the custody of such returns and reports shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission in an action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the tax commission is a party or a claimant, or on behalf of any party to any action or proceeding under the provisions of this article when the returns, reports or facts shown thereby are directly

involved in such action or proceeding, in any of which events the court may require the production of, and may admit into evidence, so much of said returns, reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. The tax commission may, nevertheless, publish a copy or a summary of any decision rendered after a hearing required by this article. Nothing herein shall be construed to prohibit the delivery to a person who has filed a return or report or his duly authorized representative of a certified copy of any return or report filed in connection with his tax or to prohibit the publication of statistics so classified as to prevent the identification of particular returns or reports and the items thereof, or the inspection by the attorney general or other legal representatives of the state of the return or report of any person required to collect or pay the tax who shall bring action to review the tax based thereon, or against whom an action or proceeding under this chapter has been recommended by the commissioner of taxation and finance or the attorney general or has been instituted, or the inspection of the returns or reports required under this article by the comptroller or duly designated officer or employee of the state department of audit and control, for purposes of the audit of a refund of any tax paid by a person required to collect or pay the tax under this article."

B. New York Public Officers Law, Article 6, entitled "Freedom of Information Law" enacted in 1944 and as amended in 1977:

1. New York Public Officers Law, § 87, formerly § 88, entitled "Access to agency records", subd 2:

"2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

"(a) are specifically exempted from disclosure by state or federal statute:

* * *

"(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public; or
iii. final agency policy or determinations; * * *"

C. Administrative Code of the City of New York, Chap 46, Title A, entitled "Sales and Related Taxes", (enacted by Local Law 1965, No. 73, July 22, 1965, effective August 1, 1965)*

1. Administrative Code § A46-2.0, entitled "Imposition of sales tax", subd (f) (1):

"* * * there is hereby imposed within the City of New York and there shall be paid a tax upon the receipts, rents, dues and charges specified in the following subdivisions (a), (b), (c), (d), (e), and (f) at the rate of four percent * * *[**]

"(f) (1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the City of New York, except charges for* [admissions] *admission to* race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools * * *."

(Emphasis added.)

*Effective June 10, 1975, after this action was commenced, the City's sales tax (including the admissions tax) was suspended by Tax law, § 1210(f) and replaced by a State tax imposed by Tax Law, § 1107 at the rate of four percent and identical, in relevant part, to the taxes imposed by Tax Law, § 1105. This State tax is to terminate upon payment of Municipal Assistance Corporation obligations, and the City tax is then to resume (Tax Law, §§ 1107[d] and 1210[i].)

**The originally adopted rate was three percent. The rate was increased to four percent effective July 1, 1974.

2. Administrative Code, § A46-1.0, entitled "Definitions", subd (d) (5):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a live dramatic, choreographic or musical performance.*" (Emphasis added.)

3. Administrative Code, § A46-7.0, entitled "Exempt organization" subd (d) (2) (B):

> "(2) The exemption provided under paragraph (1) of this subdivision [exempting admission charges to amusements for the benefit of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:
>
> * * *
>
> "(B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation * * *."

Questions Presented

1. Do the New York State Tax Law and the Administrative Code of the City of New York by not excluding circuses from the imposition of sales taxes on admission charges to places of amusement in New York State and New York City violate the petitioners' rights to free speech, due process and equal protection under the First and Fourteenth Amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution?

2. Were the petitioners deprived of the due process of law where they have not been given a right to discover tax returns and reports filed with the New York State Tax Commission under Articles 28 and 29 of the New York Tax Law where under the Tax Law the information which the returns and reports

contained cannot be disclosed, and at most the petitioners have shown mere nonenforcement of the Tax Law against others similarly situated?

Facts

The petitioner Ringling Bros. and Barnum & Bailey Combined Shows, Inc. (Ringling Bros.) is in the business of presenting performances of the Ringling Bros. circus which includes traditional live circus acts such as clown, high-wire and trapeze, animal, teeterboard, perch, jugglers, unicyclists, tumblers and horsemen and other acts. The petitioners alleged in their complaint to the New York Supreme Court that these various acts include dramatic choreographic and musical elements and include "five production number extravaganzas which combine musical selections with a choreographic procession of circus performers in various costumes built around a central dramatic theme".

The petitioner Ruth E. Lutzic in her complaint alleged that she purchased for herself and her family tickets for a performance of Ringling Bros. Circus in the City and State of New York and paid the six percent sales tax payable to the respondents pursuant to section 1105 (f) (1) of the Tax Law of the State of New York and section A46-2.0 (f) (1) of the Administrative Code of the City of New York.

Performances of the circus were presented in New York City and other cities in the State of New York at various times in the period from 1966 through 1971.

The petitioners sought in their action, *inter alia*, a declaratory judgment that:

> "(a) adjudging and declaring that Section 1105(f) (1) of the Tax Law of the State of New York, pertaining to the imposition of a sales tax on admission charges, cannot lawfully be applied to admission charges for the Ringling Bros. Circus;

> "(b) in the alternative, adjudging and declaring that Section 1105(f) (1) of the Tax Law of the State of New York, on its face and as applied, is void and unconstitutional, insofar as it imposes a sales tax on admission charges to the Ringling Bros. Circus, while exempting therefrom all other dramatic and musical arts productions; * * *"

The summons and complaints were served upon the respondent New York State Tax Commission on February 4, 1972.

Answers were served by the respondents, the State Tax Commission and the City of New York, which denied allegations made in the complaint and also asserted affirmative defenses. These defenses alleged:

(a) that the petitioners are prohibited from bringing these actions because the provision of the Tax Law limit the remedies available to them;

(b) the taxes which were paid were paid voluntarily and not under protest or duress and no recovery of them can be had;

(c) no timely demand or claim for the taxes sought to be recovered had been made; and

(d) the petitioner Ringling Bros. had not paid to the State Tax Commission taxes which it had collected.

The respondents demanded a judgment declaring that the admission charges to the circus performance of Ringling Bros. are subject to the taxes imposed by Article 28 of the Tax Law and the Administrative Code of the City of New York for all periods involved in this action and that the taxes do not violate provisions of the New York State and the United States Constitutions, together with other relief as may be proper.

On June 6, 1975 the petitioners moved for an order compelling the State Tax Commission to appear at an examination before trial and to produce certain documents in its possession. On June

10, 1975, the State Tax Commission moved for a protective order seeking a nonproduction of the documents.

On March 23, 1976, orders of Mr. Justice POSTEL at Special Term of the Supreme Court, New York County, were filed. The orders denied that part of the petitioners' motion for an order compelling production of specified documents and granted the Commission's cross-motion for a protective order with respect thereto, stating:

> "The documents sought are 'secret' and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N Y 2d 113)."

The order further granted the part of the petitioners' motion for an examination before trial. The examination before trial was adjourned *sine die*. No appeals from the orders were taken.

On January 3, 1977, the petitioners moved for an order granting them leave to renew their motion for an order compelling the State Tax Commission to produce documents in its possession relating to "the request for and preparation, and consideration of the opinion and ruling dated January 2, 1976 of Peter Crotty, Esq., Deputy Commissioner and counsel to the respondent Commission revoking its prior rulings exempting ice shows from sales taxes".

On January 20, 1977, the State Tax Commission moved for a further protective order and for summary judgment and the petitioners cross-moved for summary judgment. The City of New York supported the State Tax Commission's motion and opposed the petitioners' cross-motion for summary judgment.

On August 10, 1977, Mr. Justice POSTEL, after viewing the Ringling Bros. Circus, issued an opinion (reported in New York Law Journal on August 16, 1977) in which he held:

(a) that the admission charges to Ringling Bros. Circus were not exempt from sales taxes and found that the performances were not dramatic, choreographic or musical performances exempt from the tax;

(b) the petitioners were not deprived of due process of law;

(c) the petitioners' claim of discriminatory enforcement of the Sales Tax Law was not warranted;

(d) Ringling Bros. Circus claim that its First Amendment rights had been abridged is without merit; and

(e) therefore, the petitioners' cross-motion for leave to renew and the State Tax Commission's cross-motion for a protective order were academic.

The Court in dismissing the second cause declared that "the plaintiff circus is subject to the provisions of the New York State and New York City tax laws which require the billing and collection of sales tax on admission charge to the circus" and otherwise denied the motions. He held that a circus is a unique form of entertainment, stating:

> "A circus is not a dramatic or musical arts performance within the definition contained in section A46-1.0(d) (5) (of the Administrative Code of the City of New York). * * * The language of the tax statutes involved and their legislative history make it clear that circuses do not come within the exemption for dramatic and musical arts performances."

The Court also held that petitioners' constitutional arguments are without merit; the constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles; if

> "any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time the statute was enacted, the tax law will be upheld"

and likewise the petitioners' claim of discriminatory enforcement was also held not warranted. The Court said (13a):

> "The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection.
>
> "It merely alleges that no sales tax has been required by the defendants to be paid 'upon admission charges to the Walt Disney arena show ("Disney on Parade"), ice shows, and other shows, all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances.'
>
> "At most it amounts to an allegation that the defendant Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not alleged [sic] willfulness or fraud."

It added (14a):

> "Plaintiffs' contention that it has been deprived of due process of law has nothing to support it.
>
> • • •
>
> "Plaintiffs' contention that its First Amendment rights have been abridged is also without merit. Indeed, not only do plaintiffs fail to cite cases in support of their claim, but they also fail to tell us which First Amendment rights have been infringed."

The New York Supreme Court (KIRSCHENBAUM, J.), in its decision dated April 18, 1978, denied the petitioners' motion to renew and reargue the decision of Mr. Justice POSTEL (then retired) dated August 10, 1977 for want of a sufficient showing that the Court overlooked or misconstrued any material principles of law or fact. With regard to that part of the petitioners' motion seeking renewal of their argument based upon alleged "newly discovered events" the Court said:

> "Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of

> discrimination on the part of defendants: at most, all that plaintiffs have shown is mere nonenforcement of the statute against others similarly situated, which is not enough."

The Court thereupon adhered to Mr. Justice POSTEL's decision.

The Court also denied the petitioners' motion to replead, stating:

> "They have failed to satisfy this Court that they have good ground to support their cause of action for alleged discriminatory enforcement against interstate commerce (see CPLR § 3211 subd. e; ATI, Inc. v Ruder & Finn, Inc., 42 N Y 2d 454, 461)." (18a)

On February 3, 1978, the petitioners moved for leave to renew and reargue the decision of Justice POSTEL. The motion was opposed by the respondents.

On February 9, 1978, the State Tax Commission moved for an order for summary judgment upon the decision of Mr. Justice POSTEL. The petitioners opposed the motion until after their motion to renew and reargue was decided.

On April 18, 1978, Mr. Justice KIRSCHENBAUM issued a decision upholding the decision of Mr. Justice POSTEL after granting leave to renew the argument of Mr. Justice POSTEL's decision. An order on the decision here was entered in the office of the Clerk of the County of New York.

ARGUMENT

POINT I

The New York State Tax Law and the Administrative Code of the City of New York, by not excluding circuses from the imposition of sales taxes on admission charges to places of amusement, did not violate the petitioners' rights to free speech, due process and equal protection under the First and Fourteenth amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution.

A. *Free Speech*

The First Amendment does not grant immunity from the application of general laws. *Associated Press v National Labor Relations Board*, 301 US 103, 132 (1937); *Mabee v White Plains Publishing Co.*, 327 US 178, 184 (1946); *Oklahoma Press Publishing Co. v Walling*, 327 US 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. *In re Jager*, 29 SC 438, 7 SE 605, 609 (1888); *Arizona Pub. Co. v O'Neil*, 22 F Supp 117 (D Ct, Ariz, 1938), affd 304 US 543 (1938).

Even authors have been held subject to business taxes on receipts from licensing their works. *Steinbeck v Gerpsa*, 4 NY2d 302 (1958), app dsmd for want of a substantial fed ques 358 US 39 (1958). The taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

B. *Equal Protection and Due Process*

The constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles. The rule is elementary that a tax need not follow a pattern of rigid uniformity. *Bell's Gap R'd Co. v Pennsylvania*, 134 US 232,

237 (1890); *Lawrence v State Tax Comm.*, 286 US 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." *Citizens' Telephone Co. v Fuller*, 229 US 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. *Allied Stores of Ohio v Bowers*, 358 US 522, 528 (1959); *Rapid Transit Corp. v New York*, 303 US 573, 578 (1938); *Carmichael v Southern Coal Co.*, 301 US 495, 509 (1937); *Rast v Van Demand & Louis*, 240 US 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. *Southwestern Oil Co. v Texas*, 217 US 114, 126 (1910). (See, also, *Cook v Marshall County*, 196 US 261, 274-275 [1905]; *Brown-Forman Co. v Kentucky*, 217 US 563, 573 [1910]; *Singer Sewing Machine Co. v Brickell*, 233 US 304 [1914]; *Heisler v Thomas Colliery Co.*, 260 US 245 [1922]; *Oliver Iron Co. v Lord*, 262 US 172 [1923]; *Armour & Co. v Virginia*, 246 US 1 [1918]; and *Bradley v Richmond*, 227 US 477 [1913].)

Petitioners' claim of discriminatory enforcement is also not warranted. The discrimination in enforcement of a statute upon which courts will intervene must be purposeful, invidious, intentionally unfair. *Snowden v Hughes*, 321 US 1, 8 (1944), rehr den 321 US 804 (1944).

Mere mistake or errors in judgment by tax officials will not support a claim of discrimination violative of constitutional guaranties of equality. *Charlestown Assn. v Alderson*, 324 US 182, 190-191 (1945), rehr den 324 US 888 (1945); *Sunday Lake Iron Co. v Wakefield*, 247 US 350 (1918).

Moreover, it is not enough to show that a law has not been enforced against other persons as it has been enforced against the person claiming discrimination. *Mackay Telegraph Co. v*

Little Rock, 250 US 94, 100 (1919). There must be something which amounts to an intention, or the equivalent of fraudulent purpose to disregard the principle of uniformity. *Rowley v Chicago & N.W. Ry.*, 293 US 102, 111 (1934), rehr den 293 US 632 (1934). The burden of proof is on the taxpayer. *Charlestown Assn v Alderson, supra*, 324 US 182, 191 (1945).

The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection. It merely alleges that no sales tax has been required by the respondents to be paid "upon admission charges to the Walt Disney arena show ('Disney On Parade'), ice shows, and other shows all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances." At most it amounts to an allegation that the respondent Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not allege willfulness or fraud.

Petitioners' contention that it has been deprived of due process of law has nothing to support it. As the taxes in issue here were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute. *Shapiro v City of New York*, 32 NY2d 96, 102 (1973), app dsmd for want of a substantial fed ques, 414 US 804 (1973), pet for rehr den 414 US 1087 (1973); *Ampco Print-Advs. Corp. v City of New York*, 14 NY2d 11, 24 (1964), app dsmd for want of a substantial fed ques, 379 US 5 (1964).

C. *Interstate Commerce Clause*

There can be no question of discrimination against interstate commerce in this matter because the tax applies only to admissions to places of amusement within the State of New York, in the case of the State tax (Tax Law, § 1105[f][1]), and within the City of New York, in the case of the City tax (Admin Code, § A46-2.0[f][1]). In other words, the incidence of the tax is purely

intrastate, and petitioner Ringling Bros., insofar as its circus performances are concerned, is doing a strictly intrastate business.

POINT II

The petitioners have not demonstrated that there has been an arbitrary and discriminatory application of the tax law and therefore is not entitled to discover tax returns and reports of other taxpayers.

Mr. Justice POSTEL in his order dated March 23, 1976 denied the petitioners' motion to discover tax returns and reports filed with the New York State Tax Commission on the basis that:

> "The documents sought are 'secret' and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N.Y.2d 113)." (A-2)

The force of these secrecy provisions of New York Tax Law, § 1146 are discussed in *Matter of New York State Department of Taxation and Finance v New York State Department of Law, Statewide Organized Crime Task Force,* 44 NY2d 575 (1978). Although the order of March 23, 1976 was appealable, no appeal was taken and at that juncture became the law of the case.

On renewal of the petitioners' motion for discovery based on newly discovered events, Mr. Justice KIRSCHENBAUM in his decision dated April 18, 1978 pointed out and made the following findings:

> "In opposition to these allegations, defendants assert that the Sales Tax Bureau of the Department of Taxation and Finance is continually conducting an on-going review of all taxable places of amusements, including circuses, for the proper imposition of admission charges, union collection and remission. Furthermore, the attorney for the defendant City of New York asserts that neither she

> nor the State Tax Commission was aware of the existence of the 'Big Apple Circus', a small circus, until plaintiffs brought it to their attention. Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of discrimination on the part of defendants: at most, all that plaintiffs have shown is mere nonenforcement of the statute against others similarly situated, which is not enough." (A-18)

Accordingly it is submitted that the petitioners have failed to show that there has been unconstitutional discrimination in the enforcement of the New York State Tax Law.

CONCLUSION

Petitioners' application for a writ of certiorari should be denied.

Dated: Albany, New York
June 17, 1980

Respectfully submitted,

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APPENDIX

ORDER OF JUSTICE POSTEL, DATED MARCH 23, 1976

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 7 read on this motion, SUBMITTED

	Papers Numbered
No. 72 on Calendar of Oct. 29, 1975	
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-7
Answering Affidavit	
Replying Affidavit	
Affidavit	
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion # 73 this date.

Order of Justice Postel, Dated March 23, 1976

Motions numbered 72 and 73 on the calendar of October 29, 1975, are consolidated for disposition and disposed of as follows:

That branch of the motion by plaintiff for an order compelling production of specified documents is denied, and the cross motion for a protective order as regards the aforesaid production is granted.

The documents sought are "secret" and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N.Y. 2d 113).

The part of the motion for an order directing an examination before trial is granted, and the part of the cross motion for an order denying said examination before trial is denied.

The examination shall take place at Special Term, Part II of this court at 10 A.M., on March 29, 1976, or as agreeable to the parties. All rulings necessary with respect to said examination before trial shall be referred to the justice presiding thereat.

Dated March 23, 1976 S/.....
J.S.C.

Briefs: Plaintiff's xx Defendant's x Petitioner's Respondent's Relator's Briefs

County Clerk's No. 10219, 1975
Spec I Liber R73 Line 9, 1975

ORDER OF JUSTICE POSTEL, DATED MARCH 23, 1976

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 6 read on this motion, SUBMITTED

No. 73 on Calendar of Oct 29, 1975

	Papers Numbered
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-5
Answering Affidavit	
Replying Affidavit	
Affidavit of Service	6
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion #72 this date.

Upon the foregoing papers this motion is disposed of in accordance with decision rendered in companion motion numbered 72 on the calendar of October 29, 1975.

Dated March 23, 1976

Filed
Mar 23 1976
New York
Co. Clerk's Office

County Clerk's No. 10219, 1975
Spec I Liber R-76 Line 1, 1975

S/.....
J.S.C.

DECISION OF JUSTICE POSTEL, DATED AUGUST 10, 1977

SUPREME COURT: NEW YORK COUNTY

SPECIAL TERM: PART I

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

POSTEL, J.:

Plaintiffs move pursuant to CPLR 2221 for leave to renew the prior order of this court which denied their motion for an order directing the defendant New York State Tax Commission (hereinafter referred to as "Commission") to produce certain documents. The Commission cross-moves for a protective order pursuant to Article 31 of the CPLR, vacating plaintiffs' notice and denying production of the documents referred to therein; and also for an order pursuant to CPLR 3212 dismissing the complaint herein and directing that judgment be entered herein in favor of the Commission on the grounds that the action has no merit as a matter of law.

Plaintiffs cross-move for summary judgment granting a declaratory judgment adjudging that the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. is exempt from the provisions of the New York State Tax Law and from the provisions of the Administrative Code of the City of New York, which require the collection of state and city sales taxes on admission charges, and directing that the second cause of action be severed.

This is an action for a declaratory judgment wherein plaintiffs seek an adjudication that the annual performances at the Madison Square Garden Center and elsewhere in New

York State presented by the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. (the "Circus") are exempt from the provisions of the New York State Tax Law and the New York City Administrative Code requiring the collection of admissions taxes for certain types of public entertainment as tax-exempt "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" (Tax Law §§1105 [f][1], 1101 [d][1]; N.Y.C. Admin. Code §§A46-2.0 [f][1]; A46-1.0 [d][5]).

The circus and its coplaintiff, Ruth E. Lutzic, who purportedly sues on her own behalf as a taxpayer and circus patron and for all others similarly situated as a class, contend that the Circus presents live "dramatic or musical arts performances" within the meaning of the exemption provided in section 1105 (f)(1) of Article 28 of the Tax Law, which also defines a "dramatic or musical arts admission charge" in section 1101 (d)(5) as one charged for "admission to a theatre, opera house, concert hall, or other hall or place of assembly for a live, dramatic, choreographic or musical performance."

Therefore, plaintiffs argue the Circus is exempt from the collection of the state and city taxes on admission charges.

Defendant City of New York says that the admission charges to performances of the plaintiff circus are subject to state and city sales tax and have been subject to such taxes for all periods involved in this action. The city tax provisions in question are identical with the state tax provisions, so that judgment for one defendant would require judgment for the other.

As additional second and third grounds of the first cause of action for declaratory judgment, plaintiffs contend that the statutes in question are arbitrarily, capriciously, and unconstitutionally applied in that other entertainment extravaganzas similar to the circus, such as ice shows and "Disney on Parade," have been granted administrative exemptions from the collection of admission taxes under the above sections of the Tax Law, and that the statutes, if construed as the defendants urge, are unconstitutional on their face. These constitutional grounds based on the Equal Protection and Due Process provisions of both the United States and the New York State Constitutions, as well as on the First Amendment, present, say the plaintiffs,

factual questions which cannot and should not be decided by summary judgment. These secondary contentions therefore preclude defendants' cross-motion for summary judgment and need not be reached if the court grants plaintiffs' motion based on the statute issue.

However, the defendants say that the plaintiffs' argument with respect to discriminatory enforcement of the tax statutes does not preclude the granting of summary judgment to the defendants city and state at this time, as plaintiffs contend, because, as a matter of law, the complaint does not allege the kind of discrimination that constitutes a denial of equal protection. Only a purposeful, invidious, intentionally unfair discrimination in enforcement of a statute may amount to a denial of equal protection. Plaintiffs merely allege that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney on Parade"), ice shows, all of which are similar in nature and character to the Ringling Bros. Circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

Plaintiffs' complaint also contains a second cause of action for a refund to plaintiffs and members of the class of circus patrons of taxes previously paid for admission to the circus. This cause of action is not involved in the present cross-motions. Plaintiffs request that if summary judgment is granted to them on the first cause of action for a declaratory judgment, the two causes of action should be ordered severed pursuant to CPLR 3212 (e) (1). If summary judgment is granted to defendant on the first cause of action, the second cause of action necessarily fails.

Therefore, the primary issue presented by defendant's and plaintiffs' cross-motion is whether the Circus is subject to the state and city sales taxes on admissions.

The city tax involved herein is part of the City Sales Tax Law contained in Title A of Chapter 46 of the New York City Administrative Code. It is imposed pursuant to the authority granted to cities in Article 29 of the State Tax Law (Tax Law, §1210 [a]) to impose the taxes described in Article 28 of the Tax Law. Article 28 is the State Sales Tax Law and contains

the provisions of the state tax also involved in this action. The enabling act for the city tax requires that the city tax be identical with the state tax except in some limited respects not relevant to this action (Tax Law §1210 [a]).

The city tax in question (Admin. Code, §A46-2.0[f][1])* is imposed upon

> "(f) (1) *Any* admission charge where such admission charge is in excess of ten cents to or for the use of *any* place of amusement in the city of New York, *except charges for admission* to racetracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances,* or motion picture theatres, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools." (Emphasis supplied.)

"Place of amusement" is defined as follows (Admin. Code, §A46-1.0[d] [1-0] corresponding to Tax L., §1101[d] [10]):

> "(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided."

Plaintiffs claim that the Circus falls within the statutory exemption provided in Section A46-2.0(f) (1) of the Code and Section 1105(f) (1) of the Tax Law for "dramatic or musical arts performances," which are defined as follows (Admin. Code, §A46-1.0[d] [5] corresponding to Tax L., §1101[d] [5]):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a *live dramatic, choreographic or musical performance.*" (Emphasis supplied.)

Thus, on its face, the exemption applies to admissions to performances of the kind which are commonly regarded as part of the dramatic or musical arts and which are customarily given in theatres, opera houses, concert halls and similar places.

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* This is the same in substance as Tax Law, section 1105(f)(1) except that the latter is statewide.

Obviously, the performance must be predominantly one of the dramatic or musical arts.

The Circus is a unique form of entertainment, customarily performed in a tent or arena.

It has been defined as follows:

> "2a. A circular enclosure surrounded by tiers and seats and usually covered by a large tent, for the exhibition of feats of horsemanship, acrobatic performances, etc. Also, the company of performers with their equipage or the performance itself." Webster's New International Dictionary of the English Language—2d ed., unabridged (G. & C. Merriam Co., 1947), p. 490.

Funk and Wagnalls dictionary defines "circus" as "1. A show in which feats of horsemanship, tumbling, strength, etc., are exhibited." (The Practical Standard Dictionary of the English Language [Funk & Wagnalls Co., 1931], p. 224.)

Everyone is familiar with the traditional circus acts, which are primarily feats of physical skill, strength and daring, interspersed with clowns for comic relief and trained animals.

It seems apparent, therefore, that a circus is not a dramatic or musical arts performance within the definition contained in section A46-1.0(d) (5).

However, were there room for doubt, it would be dispelled by section A46-7.0(d) (1) of the Administrative Code (corresponding to Tax Law, §1116 [d][1]).

Section A46-7.0(d) (1) exempts from the tax admissions which are otherwise taxable but whose proceeds inure exclusively to the benefit of various religious, charitable, educational, and governmental organizations. It provides the following:

> "(d) (1) Except as provided in paragraph (2) of this subdivision, any admissions all of the proceeds of which inure exclusively to the benefit of the following organizations shall not be subject to any of the taxes imposed under subdivision (f) of section A46-2.0 . . . ."

The paragraph (2) referred to in the provision above states in pertinent part (Admin. Code, §A46-7.0[d] [2]):

> "The exemption provided under paragraph (1) of this subdivision shall not apply in the case of admissions to:
>
> * * * *
>
> "(B) Carnivals, rodeos, or *circuses* in which any professional performer or operator participates for compensation . . . ." (emphasis supplied)

Accordingly, even in situations where an admission charge would be exempt because it inured to the benefit of an exempt organization, the Legislature has explicitly provided that circuses are not to be included in that exemption where any professional performer or operator participates for compensation.

The legislative history of the exemption for dramatic or musical arts performances supports the conclusion that circuses do not come within the exemption.

The provisions of the state and city sales tax laws involved in this action derive from the former City Admissions Tax imposed by Title G of Chapter 46 of the Administrative Code.

The exemption for dramatic or musical arts performances, like that for motion pictures, was based upon economic hardship.

High costs had drastically cut the number of theatres and the number of productions in the city. The 1960 season had been the most disastrous year on Broadway. It was feared that without relief from the tax on admissions not only would the legitimate theatre industry further decline but that the city's economy would be seriously affected because of the impact of such decline on hotels, restaurants, taxis, garages and other businesses in the city.

Similarly the concert stage, opera and ballet needed relief. Accordingly, the admissions tax was amended by Local Law No. 72 of 1961 to except dramatic or musical arts performances from the tax.

The amendment, in defining "dramatic or musical arts admission charge," expressly excluded circuses, along with ice

shows and aquashows, from the definition (Admin. Code, §G46-1.0(3a), as added by L.L. No. 72 of 1961, §1).

When the state sales tax was enacted (Tax. L., Art. 28, as added by L. 1965, ch. 93), the express exclusion of circuses, ice shows and aquashows in the definition of "dramatic or musical arts admission charge" was dropped as surplusage (Tax Law, §1101 [d] [5]). As the city tax imposed by Title A of Chapter 46 of the Administrative Code was required to be substantially identical with the state tax, the express exclusion of circuses, ice shows, and aquashows was dropped from the corresponding definition in the city tax.

Further, a viewing of the circus shows that it is not a "drama,"** that the music is background music, subsidiary to the circus acts, and that the choreographic elements are incidental, being performed by persons seemingly chosen for their athletic ability in climbing ropes and riding elephants rather than training in the dance.

In short, the performance is that of a beautifully customed, well-produced circus.

The language of the tax statutes involved and their legislative history make it clear that circuses do not come within the exemption for dramatic or musical arts performances. But, should there be any doubt, this doubt must be resolved in favor of defendants.

The rule is well established that a tax exemption is never presumed or inferred; the taxpayer must bring himself clearly within its ambit, for a tax exemption will not be granted unless its terms plainly and unequivocally apply and will not be recognized in case of any doubt. Matter of Young v. Bragalini, 3 N.Y.2d 602, 605, 606 (1958); Matter of Schwartzman, 262 App. Div. 635, 636 (3d Dept. 1941) affd. 288 N.Y. 568 (1942); People v. Brooklyn Garden Apartments, 283 N.Y. 373, 380 (1940); City of Rochester v. U.F.S. Dist. No. 4 of Livonia,

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** "Drama" is defined as "1. A composition, now usually in prose, arranged for enactment, and intended to portray life or character or to tell a story by actions and, usually, dialogue tending toward some result based upon them; a play. It is designed or composed as though designed, to be performed by actors on the stage." Webster's New International Dictionary of the English Language, 2d ed., unabridged (G. & C. Merriam Co., 1947), p. 782.

255 App. Div. 96, 102 (4th Dept. 1938); Matter of Bd. of Education, Jamestown v. Baker, 241 App. Div. 574, 575-576 (4th Dept. 1934), affd. 266 N.Y. 636 (1935); People ex rel. 300 Park Avenue, Inc. v. Goldfogle, 225 App. Div. 356, 359 (1st Dept. 1929).

In light of the multitude of tax cases dealing with similar arguments, plaintiffs' constitutional arguments are without merit.

The constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles.

The rule is elementary that a tax need not follow a pattern of rigid uniformity. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Lawrence v. State Tax Comm. 286 U.S. 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938); Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937); Rast v. Van Demand & Louis, 240 U.S. 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. Southwestern Oil Co. v. Texas, 217 U.S. 114, 126 (1910).

One of the clearest statements of just how far the Legislature may go in classifying for tax purposes is to be found in People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906), affirmed 204 U.S. 152 (1907). The court stated the general proposition as follows (p. 443):

> "All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it

is unreasonable, but that does not make it unconstitutional, even if the result is double taxation."

It went on to point out that (p. 445):

"The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. . . ."

Thus, in Cook v. Marshall County, 196 U.S. 261, 274-275 (1905), a distinction between wholesale dealers and retail dealers for tax purposes was upheld. In Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910), a license tax which taxed rectifiers and blenders of distilled spirits was upheld, although the tax did not apply to distillers who did not rectify or blend their liquor. The case of Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910), sustained a tax on wholesale dealers in certain specified articles although it did not tax wholesale dealers in other articles.

In Singer Sewing Machine Co. v. Brickell, 233 U.S. 304 (1914), a tax was found valid although it was imposed on the business of selling sewing machines by traveling salesmen and was not imposed on the selling of such machines at an established place of business. It is proper to tax anthracite coal and not tax bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). The mining of iron ore where carried on by the owner may be taxed, while exempting such business if carried on by contractors. Oliver Iron Co. v. Lord, 262 U.S. 172 (1923). Manufacturers selling their own products may be excepted from a tax on merchants selling the same products. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Different tax treatment may be accorded to different classes of private bankers. Bradley v. Richmond, 227 U.S. 477 (1913). Tenants occupying real property may be taxed even though owner-occupants are not. Ampco Print.-Advs. Corp. v. City of N.Y., 14 N.Y.2d 11 (1964), appeal dismissed for want of a substantial federal question, 379 U.S. 5 (1964).

Decision of Justice Postel, Dated August 10, 1977

Plaintiffs' claim of discriminatory enforcement is also not warranted.

The discrimination in enforcement of a statute upon which courts will intervene must be purposeful, invidious, intentionally unfair. Snowden v. Hughes, 321 U.S. 1, 8 (1944), rehr. den. 321 U.S. 804 (1944); Di Maggio v. Brown, 19 N.Y.2d 283, 289-291 (1967); People v. Friedman, 302 N.Y. 75 (1950), app. dsmd. for want of subst. fed. question, 341 U.S. 907 (1951).

Mere mistake or errors in judgment by tax officials will not support a claim of discrimination violative of constitutional guaranties of equality. Charlestown Assn. v. Alderson, 324 U.S. 182, 190-191 (1945), rehr. den. 324 U.S. 888 (1945); Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918).

Moreover, it is not enough to show that a law has not been enforced against other persons as it has been enforced against the person claiming discrimination. Mackay Telegraph Co. v. Little Rock, 250 U.S. 94, 100 (1919). There must be something which amounts to an intention, or the equivalent of fraudulent purpose, to disregard the principle of uniformity. Rowley v. Chicago & N.W. Ry., 293 U.S. 102, 111 (1934), rehr. den. 293 U.S. 632 (1934). The burden of proof is on the taxpayer. (Charlestown Assn. v. Alderson, supra, 324 U.S. 182, 191 [1945]).

The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection.

It merely alleges that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney On Parade"), ice shows, and other shows all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

At most it amounts to an allegation that the defendant Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not allege willfulness or fraud.

Indeed, the plaintiffs' argument that state and city officials had no objection to a change in the law to exempt circuses is

inconsistent with a claim of intentional or fraudulent discrimination.

Plaintiffs' contention that it has been deprived of due process of law has nothing to support it.

As the taxes with which we are concerned were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute. Shapiro v. City of New York, 32 N Y 2d 96, 102 (1973), app. dsmd. for want of a substantial fed. question, 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973); Ampco Print-Advs. Corp. v. City of New York, 14 N.Y.2d 11, 24 (1964), app. dsmd. for want of a substantial fed. question, 379 U.S. 5 (1964).

Plaintiffs' contention that its First Amendment rights have been abridged is also without merit. Indeed, not only do plaintiffs fail to cite cases in support of their claim, but they also fail to tell us which First Amendment rights have been infringed.

Suffice it to say, the First Amendment does not grant immunity from the application of general laws. Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. In re Jager, 29 S. C. 438, 7 S. E. 605, 609 (1888); Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex. 1896); City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959 (1898); Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dsmd. for want of a substantial fed. question 301 U.S. 670 (1937); Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938); Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dsmd. for want of a substantial fed. question 332 U.S. 749 (1947); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953); Alaska v. Journal Printing Company, 135 F. Supp. 169 (D. Ct., Alaska, 1955).

Even authors have been held subject to business taxes on receipts from licensing their works. Steinbeck v. Gerpsa, 4 N.Y. 2d 302 (1958), app. dsmd. for want of a substantial fed. question 358 U.S. 39 (1958).

The case of Grosjean v. American Press Co., 297 U.S. 233 (1936), illustrates the kind of tax which is constitutionally objectionable under the First Amendment. In the Grosjean case, the Court struck down a gross receipts tax which was imposed solely on newspapers having a large circulation. It was shown that the real objective of the tax was to suppress newspapers hostile to the incumbent administration.

The Court made it plain that it was not holding that there is a bar against taxing newspapers, saying (p. 250):

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of government."

The opinion went on to explain that the tax was being struck down because it was a deliberate device to limit the circulation of information. It spelled this out as follows (pp. 250-251):

> "But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.
>
> . . . The tax here involved is bad not because it takes money from the pockets of appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. . . ."

It is obvious that the taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

The reasons for exempting the legitimate theatre from the taxes were economic, as were the Governors' vetoes of bills to exempt circuses.

Decision of Justice Postel, Dated August 10, 1977

Different economic factors affect arena shows, such as circuses. For example, they can accommodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense.

Accordingly, the defendant's motion for summary judgment is granted to the extent of dismissing the second cause of action. The first cause of action, which seeks a declaratory judgment is not subject to dismissal merely because plaintiffs are not entitled to the declaration which they seek (Lanza v. Wagner, 11 N.Y.2d 317, at 334; James H. Meritt Plumbing, Inc. v. City of New York, 55 A D 2d 552). Therefore, that branch of defendants' cross-motion which seeks dismissal of the first cause of action is denied.

Plaintiffs' cross-motion for summary judgment is disposed of to the extent of adjudging that the plaintiff Circus is subject to the provisions of the New York State and New York City tax laws which require the billing and collection of sales tax on admission charges to the circus, and is otherwise denied. In view of the foregoing, plaintiffs' motion for leave to renew and that branch of the defendant's cross-motion which seeks a protective order, are denied as academic.

Settle judgment.

Dated: August 10, 1977

J. S. C.

DECISION OF JUSTICE KIRSCHENBAUM, DATED APRIL 18, 1978

SUPREME COURT: NEW YORK COUNTY SPECIAL TERM: PART I

RINGLING BROS.—BARNUM & BAILEY, COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

KIRSCHENBAUM, J.

Motions under calendar numbers 35 and 36 of March 6, 1978 are consolidated for disposition.

Plaintiffs move for leave to renew and reargue the decision of Mr. Justice Postel dated August 10, 1977. Defendants move for entry of an order, pursuant to CPLR § 9002, upon the decision of Mr. Justice Postel.

In this action for a declaratory judgment, Mr. Justice Postel, now retired, rendered a lengthy decision declaring that plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. (the "Circus") was liable for collection and payment of New York State and City sales taxes on admission charges to the Circus. Insofar as plaintiffs seek reargument, the motion is denied for want of a sufficient showing that the court overlooked or misconstrued any material principles of law or fact.

That branch of plaintiffs' motion which seeks renewal of their argument concerning denial of equal protection and discriminatory enforcement is based upon allegedly "newly discovered events." Specifically, plaintiffs allege that tickets to a Spanish dance and circus arts show entitled "Estrada" which was performed in September 1977, and to the "Big Apple Circus," which was performed during the summer of 1977, and to various ice shows, were not subject to the taxes complained

of. In opposition to these allegations, defendants assert that the Sales Tax Bureau of the Department of Taxation and Finance is continually conducting an on-going review of all taxable places of amusements, including circuses, for the proper imposition of admission charges, union collection and remission. Furthermore, the attorney for the defendant City of New York asserts that neither she nor the State Tax Commission was aware of the existence of the "Big Apple Circus," a small circus, until plaintiffs brought it to their attention. Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of discrimination on the part of defendants: at most, all that plaintiffs have shown is mere nonenforcement of the statute against others similarly situated, which is not enough (see *Matter of DiMaggio* v. *Brown,* 19 N.Y.2d 283, 290-91; *Matter of G&B Publishing Co., Inc.* v. *Department of Taxation and Finance, Sales Tax Bureau,* 57 A.D. 2d 18, 21, app. den., 42 N.Y.2d 807).

Plaintiffs have submitted additional factual affidavits in support of renewal. Accordingly, leave to renew is granted. However, even considering the additional factual affidavits, the court is unconvinced that Mr. Justice Postel overlooked or misconstrued any material principles of law or fact. Accordingly, on renewal, the court adheres to the decision of Mr. Justice Postel.

Plaintiffs' other arguments are equally without merit. The request by plaintiffs in their reply papers for leave to replead is denied. They have failed to satisfy the court that they have good ground to support their proposed cause of action for alleged discriminatory enforcement against interstate commerce, (see CPLR § 3211 subd. e; *Ati, Inc.* v. *Ruder & Finn, Inc.,* 42 N.Y.2d 454, 461).

In view of this court's granting of renewal, defendants' motion, pursuant to CPLR § 9002, is denied.

Settle order.

Dated: April 18, 1978

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J.S.C.